No. **19-2806**

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DELROY TUCKER,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

Appeal from the Board of Veterans' Appeals

REPLY BRIEF FOR DELROY TUCKER

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LEGAL ARGUMENT

I. The Board's reasons and bases errors are plain.

In *Ray v. Wilkie*, 31 Vet.App. 58 (2019), the Court interpreted the phrase "unable to secure and follow a substantially gainful occupation" in 38 C.F.R. § 4.16(b) to have two components: one economic and one noneconomic. *Ray*, 31 Vet.App. at 73. The Court determined:

> The economic component simply means an occupation earning more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person. As for the noneconomic component, the Secretary himself states that "determining eligibility for TDIU requires more than determining the presence or absence of employment producing income exceeding any particular threshold," and "the ultimate inquiry is instead on the individual claimant's *ability* to secure or follow that type of employment."

Id (emphasis in original). The Court additionally provided guidance as to the meaning of a veteran's ability to "secure and follow" such employment. The Court found that, "[i]n determining whether a veteran can secure and follow a substantially gainful occupation, attention *must* be given to

- the veteran's history, education, skill, and training;
- whether the veteran has the physical ability (both exertional and nonexertional) to perform the type of activities (e.g., sedentary, light, medium, heavy, or very heavy) required by the occupation at issue. Factors that may be relevant include, but are not limited to, the veteran's limitations, if any, concerning lifting, bending, sitting, standing, walking, climbing, grasping, typing, and reaching, as well as auditory and visual limitations; and

- whether the veteran has the mental ability to perform the activities required by the occupation at issue. Factors that may be relevant include, but are not limited to, the veteran's limitations, if any, concerning memory, concentration, ability to adapt to change, handle work place stress, get along with coworkers, and demonstrate reliability and productivity."

Id. (emphasis added). Since *Ray* was decided, VA has not expounded upon the Court's guidance, and thus we are left with only the Court's interpretation of the phrase "secure and follow" in the context of § 4.16(b).

The Secretary contends that the Board had a plausible basis for its decision and provided an adequate statement of reasons or bases that substantially complied with the Court's April 2018 Memorandum Decision, and to the extent there were any errors they were not prejudicial, because the Board relied on Appellant's compensated work therapy (CWT) positions in finding that he is able to perform the physical acts of employment. *See* Sec. Br. at 8-20. However, the Secretary's argument attempts to circumnavigate the Board's responsibility to discuss the factors identified in *Ray* in any meaningful way. Moreover, under the Secretary's analysis, the Board, in order to deny TDIU, need only explain why a veteran is able to "follow" a substantially gainful occupation without any consideration as to whether such work could be "secured" in the first instance. Further, despite the Secretary's best efforts to justify the Board's decision, the Board failed to consider material evidence favorable to Appellant, thereby frustrating judicial review, and relied on medical evidence that imposes

limitations inconsistent with the Board's conclusion that Mr. Tucker can perform the physical tasks of employment as a building maintenance engineer or butcher in a substantially gainful manner. Relatedly, in finding that Appellant can perform or "follow" the physical acts of employment, the Board failed to adequately explain why it accorded more probative value to Mr. Tucker's short-lived attempts at CWT positions, one of which appears to have been a part-time job and the other of which lasted only a few days, over expert vocational rehabilitation counselor reports opining that Appellant cannot "secure and follow" substantial gainful employment. Finally, 38 U.S.C. § 1718(g) explicitly prohibits the Board from considering a veteran's participation in CWT "as a basis for the denial of a rating of total disability . . . based on the veteran's inability to secure or follow a substantially gainful occupation as a result of disability."

The Secretary first contends that, "the Board dedicated a significant portion of its decision discussing evidence of Appellant's employment history," namely Appellant's "positions in engineering maintenance, carpentry, and as a butcher." *See* Sec Br. at 10. Yet, the Board itself acknowledged that these positions were compensated work therapy (CWT), and that CWT does not constitute employment. R. at 8 (1-11). Thus, the Board's discussion of jobs secured as part of CWT cannot satisfy its obligation to discuss Appellant's employment history. *See Ray*, 31 Vet.App. at 73. In turn, Appellant and the Court are left wondering

whether Mr. Tucker's employment history, primarily as an electrician's assistant, *see* App. Br. at 16-17, has given him the skills and training necessary to "secure and follow" substantially gainful employment, considering all other relevant factors. *See Donnellan v. Shinseki*, 24 Vet.App. 167 (2010) (The Board's statement of reasons or bases "must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"). As such, the Board erred when it failed to adequately consider Appellant's occupational background in adjudicating entitlement to TDIU. *See Ray*, 31 Vet.App. at 73; *see also Cathell v. Brown*, 8 Vet.App. 539, 544 (1996) (" '[T]o merely allude to educational and occupational history, attempting in no way to relate these factors to the disabilities of the appellant, and conclude that some form of employment is available,' is insufficient reasons or bases for the decision" (quoting *Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991))).

Not only did the Board err in failing to discuss Mr. Tucker's actual employment history, as opposed to merely discussing Appellant's CWT, but the Board overlooked material evidence dispositive to the above-noted question, namely the multiple VA vocational rehabilitation counselor reports that considered Mr. Tucker's education level and employment history and concluded that he lacked the transferable skills to secure and follow substantial gainful employment in light of his service-connected disabilities. *See* App. Br. at 11-12; R.

at 8754 (December 1999 Vocational Counselor Report), 7315-18 (November 2012 Vocational Counselor Report), and 1852-63 (December 2016 Vocational Counselor Report); *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (To comply with this requirement, "the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive, *and provide reasons for its rejection of any material evidence favorable to the veteran*) (emphasis added).

Next, the Secretary does not dispute that the Board failed to consider Appellant's education in its TDIU analysis, but contends that Appellant has failed to point to any evidence of record that he believes the Board failed to consider regarding his educational background, and that as such the Court should not entertain this vague assertion of error. *See* Sec. Br. at 12. However, this Court holds that the Board's failure to consider Mr. Tucker's education in its TDIU analysis renders its statement of reasons or bases inadequate. *See Ray*, 31 Vet.App. at 7; *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc) ("When the Board conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history"); *see also Cathell*, 8 Vet.App. at 544. The reason for this is simple. An individual's education, in addition to factors such as employment history, training, skill transferability, and the exertional and non-exertional limitations caused by the underlying service-

connected disability, is relevant to the question of whether a veteran can secure a substantially gainful occupation in the competitive market, a concept that both the Board and Secretary fail to comprehend. Thus, even if Mr. Tucker's employment history and education would not in theory have precluded him from continuing in, or "following" a substantially gainful job such as a building maintenance engineer or butcher, as noted by VA's vocational rehabilitation counselors, Mr. Tucker's education, when combined with other pertinent factors to include his service-connected disabilities, would prevent him from securing such jobs in the competitive market when considered in combination with his service-connected disabilities.

Additionally, contrary to the Secretary's contention, Appellant has identified evidence that he believes the Board failed to consider regarding his educational background. Appellant explicitly argued that the Board erred when it failed to consider the multiple VA vocational rehabilitation counselor reports. *See* App. Br. at 11-12; R. at 8754, 7315-18, and 1852-63. As noted above, these vocational rehabilitation counselors considered Mr. Tucker's education as part of their assessment, and nevertheless determined that Mr. Tucker lacked transferable skills so as to preclude substantial gainful employment as a result of limitations caused by Appellant's service-connected disabilities. *See Id*. Of course, since the Board did not consider this evidence, it did not explain why it

determined that Mr. Tucker's short-lived participation in CWT was more probative to his ability to "secure and follow" a substantially gainful occupation. *See Donnellan v. Shinseki*, 24 Vet.App 167 (2010). Thus, the Secretary's argument here is likewise misguided.

Next, the Secretary has failed to adequately respond to Appellant's argument that the Board provided an inadequate statement of reasons or bases when it overlooked evidence indicating that Mr. Tucker's CWT position as a building maintenance engineer was part-time, and that as such the Board's reliance on Appellant's ability to perform the physical acts of this job frustrated judicial review as it is unclear if the Board was basing its determination on Mr. Tucker sustaining a physical capacity that would not otherwise equate to substantially gainful employment. *See* App. Br. at 22-23. The Secretary contends that this error was non-prejudicial because the Board's TDIU decision was not based on whether Appellant's employment was marginal, but because "the evidence demonstrated that he is *capable* of performing the physical tasks required by employment . . . . " Sec. Br. at 12-13. This argument is illogical; one cannot equate, for example, a 20-hour work week to a 40-hour work week. If Mr. Tucker's CWT position was part-time, or "marginal," then the evidence upon which the Board relied did not evidence an ability to perform the physical tasks of substantially gainful employment. Consequently, the Board's failure to discuss

whether the January 2018 VA vocational counseling note, *see* App. Br. at 22 citing to R. at 1081-82, establish that Mr. Tucker's CWT building engineer position was part-time, or marginal on a facts found basis, thus undermines the entire foundation of its rationale. Moreover, in addition to the fact that the positions the Board relied upon were only secured via VA's CWT program, which in and of itself warrants a discussion of if Mr. Tucker is capable of more than just marginal employment, *see* 38 U.S.C. § 1718, if Appellant's CWT building maintenance engineering job was indeed part-time, then the evidence upon which the Board relied to deny entitlement to TDIU reflects that Mr. Tucker may not have been capable of more than marginal employment, in which case the Board erred in failing to discuss whether Appellant was only capable of marginal employment. *See Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016) (holding that "when the facts of the case reasonably raise the issue of whether that veteran's ability might be limited to marginal employment, the Board's statement of reasons or bases must address this issue and, when appropriate, explain why the evidence does not demonstrate that the veteran is incapable of more than marginal employment"). Indeed, 38 U.S.C. § 1718(g) explicitly prohibits the Board from considering a veteran's participation in CWT "as a basis for the denial of a rating of total disability . . . based on the veteran's inability to secure or follow a substantially gainful occupation as a result of disability," thereby indicating that

CWT is not equitable to performing the physical acts of substantial gainful employment. As such, the Board erred when it relied on the participation in CWT to deny TDIU.

The Secretary next maintains that the Board did not contradict itself when it determined that Mr. Tucker could perform the physical acts of employment as a building maintenance engineer and butcher despite relying on evidence precluding Appellant from heavy lifting, namely the August 2015 VA examination and July 2016 VHA examination, because the Board determined that Mr. Tucker actually performed the physical acts of those CWT jobs, one of which appears to have been part-time, *see* App. Br. at 22-23 (citing to R. at 1081-82), and the other of which was performed for a mere matter of days. *See* App. Br. at 18 (citing to R. at 1058; 1061-62 (1043-62)). However, as noted above, 38 U.S.C. § 1718(g) prohibits the Board from relying on Mr. Tucker's participation in CWT to deny TDIU. Moreover, notwithstanding this Statute, the Secretary's argument is illogical. If the Board, relying on the August 2015 VA and July2016 VHA examinations, determined that Mr. Tucker cannot perform heavy lifting, consistent with his history of not being able to "follow" substantially gainful occupations as an electrician or cement mason, then it follows that Mr. Tucker would be unable to "secure and follow" the occupations he secured through VA's CWT program, which likewise require medium to heavy lifting. On this

point, Appellant would note that despite the Court's insistence, VA has not expounded on the Court's interpretation of the phrase "secure and follow" in the context of § 4.16(b), and as such there is no durational component to that phrase. As such, we are left with the factors that the Court outlined in *Ray* and, when applying the limitation to avoid heavy lifting consistent with jobs as an electrician and cement mason,[1] as the Board has done, it is unclear how the Board determined he would be able to "secure and follow" substantially gainful employment as a building maintenance engineer or butcher as those jobs require the same physical exertion level under the Dictionary of Occupational Titles and O*NET.

As to the Secretary's contention that Appellant cites to "general descriptions of tasks apparently required by these professions," *see* Sec. Br. at 20, such is not the case. Rather, Appellant's descriptions of his past employment and the CWT positions that Board determined he was capable of performing is based on the Dictionary of Occupational Titles and the O*NET Program, the latter of which was developed under the sponsorship of the U.S. Department of

[1] Akin to the job of a building maintenance engineer, both an electrician and a stone mason requires a medium level of exertion under the Dictionary of Occupational Titles. *See*: https://occupationalinfo.org/82/829261018.html and https://occupationalinfo.org/86/861381038.html, respectively. *Last viewed* 6/10/2020.

Labor/Employment and Training Administration (USDOL.ETA),[2] and both of which are utilized by the Social Security Administration in adjudicating if an individual meets their definition of "disabled."[3]

Additionally, contrary to the Secretary's assertion, the Board's failure to reconsider the adequacy of the July 2016 VHA medical opinion, as directed by the Court in its April 2018 Memorandum Decision, did prejudice Appellant. Namely, the Board relied on the August 2016 VHA examination to determine that Mr. Tucker was able to perform the physical tasks associated with the substantial gainful occupations of a building maintenance engineer and butcher. *See* R. at 1-11. However, the Board still failed to reconsider if that examination was adequate given the deficiencies identified by the Court in its April 2018 Memorandum Decision, which include that examiner's failure to consider the impact of Mr. Tucker's service-connected bilateral lower extremity radiculopathy as secondary to back disability and the significant restrictions in Appellant's ability to bend forward and his need to use external supports for ambulation. *See* App. Br. at 24-26, citing to R. at 1024-32 (980-1037). Thus, because the July 2016 VHA examination was inadequate, the Board erred in relying on it to determine that Mr. Tucker can perform the physical tasks of employment as a building

[2] See: https://onetcenter.org/overview.html. *Last viewed* 6/10/2020.

[3] See: https://www.ssa.gov/disabilityresearch/occupational_info_systems.html. *Last viewed* 6/10/2020.

maintenance engineer and butcher/meat cutter. *See Stefl v. Nicholson*, 21 Vet.App. 120 (the Board's reliance on an inadequate medical examination renders its statement of reasons or bases inadequate). As argued in Appellant's initial brief, the Board has not explained how Appellant would be able to, without the aid of CWT, secure and follow substantially gainful employment given Mr. Tucker's limitations in bending and his need to use external supports for ambulation.

In response to Appellant's argument that the Board failed to consider if staged ratings for TDIU were warranted, the Secretary has merely contended that, " "the sole fact that a claimant is unemployed or has difficulty obtaining unemployment is not enough." " *See* Sec. Br. at 14 (quoting to *Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993)). Not only does this argument constitute impermissible post hoc rationalization as the Board never discussed the matter, *see In re Lee*, 227 F.3d 1338, 1345-46 (Fed.Cir.2002) ((" '[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.' ") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed2d 207 (1962)), but Appellant did not rely exclusively on the fact that Mr. Tucker was unemployed at those times. Rather, Appellant has pointed to evidence indicating that his exertional and non-exertional restrictions are significantly worse than merely the inability to lift heavy items, as contemplated by the August 2015 VA and July 2016 VHA examiners. Such evidence includes

Mr. Tucker's lay statements, *see* App. Br. at 10-11 and 12-15, expert opinions from vocational rehabilitation counselors, *see* App. Br. at 11-12, and medical expert opinions. *See* App. Br. at 12-15; 27-28.[4]

Finally, contrary to the Secretary's assertion, Appellant has pointed to evidence showing that Mr. Tucker's service-connected bilateral lower extremity radiculopathy impacts his ability to obtain and follow substantially gainful employment. *See* Sec. Br. at 16. Specifically, as noted in Appellant's opening brief, Mr. Tucker has stated that his leg numbness limits his ability to ambulate. *See* App. Br. at 13, citing to R. at 7395-7401 (July 2011 VA Examination). As such, the Board had an obligation to discuss if Mr. Tucker's appeal for an increased rating for his service-connected disability was inextricably intertwined with his claim for TDIU. *See Begin v. Derwinski*, 3 Vet.App. 257, 258 (1992) (citing 38 C.F.R. § 4.16

[4] Such evidence includes: VA's June 2011 examination (noting Appellant' occasional use of a cane and lumbar brace, and limitations in his ability to tolerate prolonged weight bearing, perform heavy lifting, and ambulate) (R. at 7395-7401); June 2014 VA examination (noting Mr. Tucker's occasional need for a cane) (R. at 5213-18); Dr. AMD's August 2016 Examination for Housebound Status (noting that Appellant cannot stand to prepare his own meals, has an antalgic gait requiring the use of a cane and bilateral knee braces, and can only leave his home daily for a 1-2 hour trip) (R. at 2259-60); December 2016 VA examination (noting Appellant's use of a cane and brace for ambulation and partial impairment in Appellant's ability to perform the physical acts of employment, such as heavy lifting, pushing, pulling, or carrying) (R. at 1838-47); and June 2018 VA examination (noting limitations in Mr. Tucker's ability to work on tasks that require prolonged standing or sitting, repetitive bending or lifting, or any task that requires pulling, pushing, crawling, or stooping) (R. at 811-20).

(1991)); accord *Babchek v. Principi*, 3 Vet.App. 466, 467 (1992) ("The appellant's claim for [a TDIU rating] is inextricably intertwined with the degree of impairment that is ultimately adjudicated."); *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (finding two claims inextricably intertwined where decision on one issue would have a "significant impact" upon another, and that impact "could render any review by this Court of the decision [on the other] claim meaningless and a waste of judicial resources.").

In summary, the Board's conclusion that Mr. Tucker can perform the physical acts of employment based solely on his participation in CWT does not satisfy the Court's interpretation of the phrase "secure and follow" in the context of 38 C.F.R. § 4.16(b). *See Ray*, 31 Vet.App. at 73. Rather, the Court must consider Appellant's education, employment history, job skills, training, and the exertional and non-exertional limitations imposed by his service-connected disabilities to assess if he is able to "secure and follow" a substantially gainful occupation. These factors are well-chronicled by the evidence and, as indicated by the VA vocational rehabilitation counselor reports, militate in favor of entitlement to TDIU. Yet, the Board, rather than perform this holistic analysis, relied on Mr. Tucker's participation in CWT, which is prohibited by statute. *See* 38 U.S.C. § 1718(g). Finally, even if the Board's reliance on Mr. Tucker's participation in CWT to deny TDIU was permissible, the Board, at a minimum,

failed to account for material evidence favorable to Appellant and explain why Mr. Tucker's short-lived participation in CWT outweighed the other evidence of record, including the vocational rehabilitation counselor reports, indicating that Appellant would not be able to secure and follow a substantially gainful occupation. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Donnellan v. Shinseki*, 24 Vet.App. 167 (2010).

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the decision on appeal be vacated or otherwise set aside and remanded for further adjudication.

Respectfully submitted,

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